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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

HILDEGARD LUISE ADAM, as Executor, etc., Plaintiff and Appellant, v. ROBERT YOUNG, Defendant and Respondent.	B237056 (Los Angeles County Super. Ct. No. MC 022058)

APPEAL from a judgment of the Superior Court of Los Angeles County, Brian C. Yep, Judge. Affirmed.

Law Offices of Matthew C. Mickelson and Matthew C. Mickelson for Plaintiff and Appellant.

Law Offices of Gary S. Soter and Gary S. Soter for Defendant and Respondent.

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Theresa Schulz obtained a default judgment of $150,410 against respondent Robert Young on May 13, 2011. Schulz died on June 9, 2011, and Hildegard Luise Adam, executor of her estate and successor in interest, was substituted as plaintiff. The trial court granted respondent's motion to vacate the judgment and this appeal followed.[1] We conclude that the trial court did not abuse its discretion in granting the motion and therefore affirm the order.

FACTS

According to Schulz's declaration under penalty of perjury submitted in support of the application for a default judgment, respondent was married to Schulz's niece, Ingrid. Schulz, 84 and living alone, was unable to drive and therefore kept "substantial amount of money in cash at my mobile home." Respondent and Ingrid, who is now deceased, gained Schulz's trust and agreed to hold for Schulz $150,000 in safekeeping. When Schulz asked for her money, however, respondent refused to give it back, denying that Schulz had ever given him money.

Respondent's motion under Code of Civil Procedure section 473 was filed on or about September 12, 2011. Attached to the motion is an attorney's demand letter dated August 12, 2010, addressed to respondent, which states that Schulz had given respondent $95,000 in cash for safekeeping and that she wanted that money back.

Also attached to respondent's motion is a copy of a return of service that states that respondent was personally served on December 13, 2010, at "12745 Arroys [*sic*] Street[,] Sylmar, CA" at 8:15 a.m. by Artur Sargsyan. The two documents stated to have been served were the summons and complaint. Sargsyan's signature on this return is dated December 14, 2010. Also accompanying the motion was a second return of service that was identical to the first return, with these exceptions: (1) Also served were the alternate dispute resolution package and a notice of case assignment, and (2) Sargsyan's signature on this return is dated March 8, 2011.

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[1] An order granting a motion to vacate a default judgment is appealable. (*County of Stanislaus v. Johnson* (1996) 43 Cal.App.4th 832, 834.)

Respondent's detailed declaration under penalty of perjury stated that he manages a UPS facility located at 12745 Arroyo Street in Sylmar. His declaration states that outsiders, including process servers, are not allowed access to the interior of the UPS facility. If a person requests access to the facility or to a person in the facility, the requester's name is logged by the security service. According to respondent, the log for December 13, 2010, makes no reference to a process server or an attempted service of process. Needless to say, respondent states he was not served on December 13, 2010, or on any other day.

Sargsyan's declaration under penalty of perjury acknowledges that he was stopped by the security service at the gate and never proceeded further. The declaration goes on to state that after the guard telephoned for respondent, Sargsyan waited outside for 40 minutes until respondent came outside and identified himself. According to Sargsyan, that is when respondent was served.

Returning to respondent's declaration, it appears that a first request for an entry of default was rejected because the return of service did not show that the alternate dispute resolution package and a notice of case assignment had also been served, along with the summons and complaint.

Respondent's motion is also supported by a declaration of the manager of the security service at the UPS facility. According to this declaration, the shift activity report for December 13, 2010, makes no reference to a process server. The protocol for service of process was to have the UPS employee served outside the facility, when he or she got off work.

DISCUSSION

1. It Was Not an Abuse of Discretion to Refuse the Request That Sargsyan Testify

During the hearing on respondent's motion, counsel for appellant inquired whether the court had any questions it wanted to ask the process server, who was present in

court.[2] The trial court replied: "No. I am sure he is not going to tell me anything different than what is in his declaration."[3]

Appellant contends it was an abuse of discretion not to have Sargsyan testify orally during the hearing.

There are three reasons why we disagree with appellant.

First. The trial court's statement was eminently reasonable. There was nothing to gain from oral testimony. Sargsyan's declaration was detailed, including such matters as the allegedly chilly weather and "waiting outside in that cold for 40 minutes chilled me greatly." Thus, it was not as if the trial court was faced with a conclusory or even ambiguous declaration. The issue was clearly drawn: Had Sargsyan actually waited for respondent and then served him? If Sargsyan's declaration was perjurious, there was no point in adding another layer of perjury.

Second. Given that the standard of review is abuse of discretion (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258), our review of the decision not to accept oral testimony is particularly deferential. A decision of this sort is based, at least in part, on factors the paper record does not reveal, which means that the trial court has particularly wide discretion in making this decision. We are not inclined to second-guess the trial court's decision rejecting oral testimony.

Third. "There is simply no authority for the proposition that a trial court necessarily abuses its discretion, in a motion proceeding, by resolving evidentiary conflicts without hearing live testimony." (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 414.) It is true that the matter of live testimony in motion hearings is consigned to the discretion of the trial court (*Eddy v. Temkin* (1985) 167 Cal.App.3d 1115, 1121), but it is also true that the review of this matter must necessarily be deferential, as we have noted.

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[2] There may also have been a written request to present oral testimony.

[3] During oral argument, counsel for appellant admitted he did not ask the court to allow the process server to testify.

We find appellant's argument unconvincing that credibility determinations require oral testimony. In this case, if respondent and Sargsyan had taken the stand (and if Sargsyan did, respondent should also have done so), both would have emphatically reiterated their declarations, with the result that one of them would have been lying. This unedifying spectacle would not have aided in the search for truth.

We grant appellant's point that, in some cases, oral testimony on motions may be indicated. But this was not such a case. The factors in deciding whom to believe were that respondent's declaration was corroborated, that there were irregularities in the returns of service that undercut Sargsyan's credibility and that it could hardly be supposed that respondent, having been served with what he would have considered a groundless yet dangerous lawsuit for $150,000, would simply have allowed the action to proceed to a default. While we appreciate the trial court's diplomacy in saying that this was a close call, we think that the weight of the evidence is on respondent's side. And, importantly for appellant's principal contention on appeal, there is absolutely nothing to suggest that Sargsyan's "live testimony" would have made any difference.

Appellant seeks comfort in the trial court's further statement that "there are a lot of mysteries that were not explained by either side here." But this does not mean, as appellant suggests, that the trial court passed on the opportunity to clear up these mysteries by questioning Sargsyan. The reference to mysteries was clearly a tongue-in-cheek comment about some of the odd contours of this case, not the least of which is the question whether Schulz had given respondent $95,000 or $150,000, assuming she gave him something for safekeeping, which of course has yet to be shown.

We agree with the trial court that California favors adjudication on the merits. Contrary to appellant's claim, this comment does not indicate that the trial court evaded its responsibility in weighing the evidence but rather shows that the court was aware of relevant policy considerations.

In her reply brief, appellant claims that not allowing Sargsyan to testify was structural error because appellant "was not allowed to provide the necessary evidence." New arguments, however, may not be made in a reply brief. (*Kahn v. Wilson* (1898) 120

Cal. 643, 644) In any event, there is no question at all that appellant was allowed to present evidence and that she did so, including Sargsyan's declaration.

DISPOSITION

The judgment (order) is affirmed. Respondent is to recover his costs on appeal.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.